DLA Piper UK LLP
1 St Paul's Place
Sheffield
S1 2JX
United Kingdom
DX 708580 Sheffield 10
T +44 114 283 3302
F +44 114 276 5246
W www.dlapiper.com

The Grenfell Tower Inquiry
13 Bishop's Bridge Road
London
W2 6BU

Your reference

Our reference
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27 March 2020

By Email Only: solicitor@grenfelltowerinquiry.org.uk

Dear Sirs

APPLICATION TO EXTEND THE SCOPE OF THE ATTORNEY GENERAL'S UNDERTAKING TO LEGAL PERSONS
APPLICATION BY ARCONIC ARCHITECTURAL PRODUCTS SAS

We understand from the Inquiry's letter dated 20 March 2020 that the Attorney General's Office has informed the Inquiry that any application to extend the scope of the undertaking to a specific legal person should be made by the Inquiry Panel itself. In the Inquiry's letter of 20 March 2020, the Inquiry invited core participants to identify any other companies which, in the view of the core participant, should be brought within the scope of the undertaking in order to enable the Inquiry to carry out its work, setting out the grounds on which that step is said to be necessary. We are very grateful for the opportunity to undertake this task and hope that the comments below will be of assistance. It will be seen that we have taken as our starting point the views which the Inquiry itself formed and expressed to the Attorney General in earlier correspondence, though of course we recognise that it is entirely a matter for the Inquiry whether it proposes to refer matters back to the Attorney General along the lines we suggest below.

As explained in the Inquiry's letter dated 20 February 2020, "it is well established that a company can itself both answer questions and claim privilege against self-incrimination if the answer would tend to expose it to a risk of prosecution: see *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass* (1934) Ltd [1939] 2 K.B. 395".

Arconic Architectural Products SAS ("AAP SAS") seeks an extension of the Attorney General's undertaking to include AAP SAS. In doing so, AAP SAS makes no concession that it has acted in breach of the criminal law. Nevertheless, an extension to the scope of the Attorney's General undertaking should equally encompass AAP-SAS. We support the Inquiry's initial approach which was to include legal persons within the scope of the undertaking. As explained in the Inquiry's letter dated 20 February 2020 "…It would be very disruptive of the Inquiry's proceedings if witnesses were to object to answering questions on the grounds that their answers could be treated as having been given by their company which was not obliged to incriminate itself. Since the undertaking we seek is intended only to provide protection to individuals equivalent to that which would be available in the form of

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UK switchboard
+44 (0) 20 7349 0296

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the privilege against self-incrimination, the effect of including companies within its scope would simply ensure that, if and insofar as they could be regarded as having given evidence, they would also be protected against self-incrimination to the same extent as under the general law”.

By doing so, and as the Inquiry referred to in its letter to the Attorney General’s Office dated 24 February 2020, the Inquiry Panel would not have to investigate the nature of the relationship between the witness and a company for the purpose of ascertaining whether an answer would or would not be that of the company. As the Inquiry also explained to the Attorney General’s Office, whether the prosecutor later wants to use any answer to further a prosecution against a company on the basis that an answer was not that of the company will be a matter to be resolved at that later stage.

We note from the Inquiry’s letter dated 20 March 2020 that the Inquiry’s core reasoning in relation to the application by Osborne Berry Installations Limited (“Osborne Berry”) was that Mr Osborne and Mr Berry control the company known as Osborne Berry and when they give evidence to the Inquiry they “might have to be regarded as embodying the company” for the purposes of answering some questions relating to acts that they personally carried out on its behalf, and perhaps more generally.

The same line of reasoning applies to Mr Claude Schmidt, who the Inquiry currently propose to call to give evidence to the Inquiry. Mr Schmidt is employed as the President of AAP SAS and is therefore to be regarded as part of AAP-SAS’s controlling mind. If Mr Schmidt gives evidence, he will have to be regarded as embodying AAP-SAS. Thus, it follows that if Mr Schmidt gives evidence to Inquiry, he gives that evidence wearing two hats – his own hat and that of AAP-SAS. He is to be regarded as the “persona of the company” The dictum of Lord Reid in *Tesco Supermarkets Limited v Nattrass* [1972] AC 153 at page 170D – G is instructive on this point:

> "I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent."

The central logic, therefore, which supports the extension of the undertaking to Osborne Berry equally applies to other companies including AAP – SAS.

Moreover, and whilst the Inquiry has previously indicated that it does not propose to investigate the nature of the relationship between the witness and the company for the purpose of determining whether the company's privilege against self-incrimination is engaged, we take the view that the AAP SAS's privilege extends to all its witnesses. The privilege to which a company is entitled cannot be evaded by seeking the evidence which the company could not be compelled to give from officers or servants of the company through the "back door". Whilst there does not appear to be any legal authority which decides this issue, the issue was identified (but not resolved) in *Rio Tinto Zinc Corporation & Others v Westinghouse Electric Corporation* [1978] AC 547. In that case, whilst the House of Lords was not of one voice on the issue, Viscount Dilhorne noted that "it would render the company's privilege of little value if it can be got round" by compelling the evidence from officers and servants (page 632C). The issue was also very recently identified (but again not resolved) in *Jamie Walker v Chelmsford City Council* [2020] EWHC 635 (Admin) at paragraphs 39 to 42. As we explained above in paragraph 4, in accordance with the approach which has been advocated by the Inquiry in its letter dated 24 February 2020, these legal issues would be issues to be resolved, if resolution becomes necessary, in any later proceedings.

Our position, however, is that AAP-SAS's privilege against self-incrimination would be applicable not just in relation to Mr Schmidt, but in relation to all its witnesses.

By extending the undertaking to cover legal persons including AAP-SAS, it avoids the disruption to the Inquiry's proceedings where witnesses invoke a company's privilege against self-incrimination. Whilst the Inquiry has not yet provided any "Salmon letters" providing fair notice of any criticisms or allegations to be made against persons and the substance of the evidence in support of those allegations, we do note the content of the Chairman's letter to the Attorney General dated 7 February 2020 which stated that:

> "In Module 2, the Inquiry proposes to hear oral evidence from employees, former employees and directors of Arconic, which made and sold the ACM rainscreen panels used in the cladding , from Celotex, which made and sold the insulation materials used in the cladding, and other witnesses from the manufacturers of the other materials I have listed above. We also intend to take evidence from testing bodies who performed certain key tests and the certification bodies who issued the relevant certificates pertaining to these products which set out the relevant fire safety characteristics and classification…"
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> and
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> …..So far as Modules 2 and 3 are concerned, although the identities of our proposed witnesses have not yet been finally established, the Inquiry team has taken many statements and obtained many documents relevant to the matters to be investigated in the course of them. As a result, the identities of those whom it will be necessary to call and the lines of questioning that will need to be followed are becoming clearer. At this stage we can therefore say with confidence that the issues which will arise for investigation in Modules 2 and 3 are also very likely to involve potential offences under the 1974 Act and subordinate legislation (pre-eminently, under the Construction (Design

and Management) Regulations 2007 and 2015) and the Fire Safety Order, as well (in the case of Module 2) as the possibility of offences under the Fraud Act 2006 and the common law relating to conspiracy to defraud. For example, any questions put to employees of the manufacturers or sellers of the cladding materials about how they came to market potentially dangerous products are likely to lead to their invoking the privilege against self-incrimination, in many cases successfully."

In the circumstances, AAP-SAS seeks an extension of the Attorney General's undertaking to include AAP SAS.

We would be grateful if the Inquiry would kindly copy to us any correspondence on this topic with the Attorney General or otherwise, and likewise any response from the Attorney General which may be received.

Yours faithfully

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